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Supreme Court, U.S.
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No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CONSUL, LTD.

Petitioner,

v.

TRANSCO ENERGY COMPANY, formerly known as TRANSCO COMPANIES, INC., and TRANSCONTINENTAL GAS PIPE LINE CORPORATION

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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40 pp

QUESTIONS PRESENTED

1. Whether it is an illegal attempt to monopolize under Section 2 of the Sherman Act for a company with control over transportation of natural gas to foreclose potential entrants into markets for the purchase and sales of natural gas?

2. Whether the Fourth Circuit applied the wrong legal standard in holding that two natural gas fields from which plaintiff sought to meet emergency needs of both gas distribution companies and industrial end users were not relevant markets susceptible to monopolization in violation of Section 2 of the Sherman Act?

LIST OF PARTIES

Petitioner: Consul Ltd., a consulting firm of which the principals are Kenneth B. Wilson and Tenney I. Deane, Jr.

Respondents: Transco Energy Company, formerly known as Transco Companies, Inc., and Transcontinental Gas Pipe Line Corporation.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner Consul, Ltd. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on November 14, 1986, petition for rehearing *en banc* denied December 30, 1986.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on November 14, 1986. A timely petition for rehearing *en banc* was denied on December 30, 1986, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code Title 15 §2
Sherman Antitrust Act

> §2 Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Clayton Act 15 U.S.C. §12-27

(Section 4 of the Clayton Act)

> §4 That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall re-

cover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

This is a civil antitrust case under Section 4 of the Clayton Act to recover damages and for injunctive relief under Section 2 of the Sherman Act. Both attempted and actual monopolization are charged under Section 2 by reason of the defendant Transco's refusal to transport gas for a fee during a period of shortage when there was ample capacity in its pipeline. The claim for injunctive relief relates to an ongoing policy of Transco not to transport for a fee when such transportation would conflict with Transco policy.

The plaintiff is a diversified consulting firm, the two principals of which on energy matters are Kenneth B. Wilson and Tenney I. Deane, Jr. (J.R. pp. 1526-29) The defendant corporations are Transco Energy Company, a Delaware holding company with its national offices at Houston, Texas, and its subsidiary, Transcontinental Gas Pipeline Corp., also a Delaware corporation with its national office in Houston, Texas. (J.R. pp. 13, 11Aff) Defendants are herein collectively referred to as Transco. Transco owns and operates an interstate natural gas pipeline that extends from the Gulf of Mexico to the State of New York. (J.R. pp. 14, 11Aff) It is the only means of transporting natural gas into the state of North Carolina. (J.R. pp. 1423-25)

Transco's pipeline is in some areas like North Carolina the only available pipeline that serves its cus-

tomers. Major metropolitan areas are generally served by two or more pipelines, so that the degree of monopoly power varies from one geographic area to another. (J.R. pp. 1394; 1425) At the supply end, Transco's proximity to natural gas fields varies. Since the price of gas was regulated until 1978, competing pipelines could not offer differing prices so that economics normally dictated that a source of gas would be sold to the nearest pipeline. (J.R. pp. 1421-22)

The events giving rise to plaintiff's damage claim occurred in 1978. As a result of a nationwide shortage that developed early in the 1970's and continued into 1979, numerous pipeline systems, including Transco's, were in curtailment. (J.R. pp. 1143-46; 1406) Federal regulatory changes of two kinds had been made in response to the shortage conditions. One was a set of end user allocations that gave highest priority to residential heating, hospitals, and other essential services, and lowest priority to industrial users. (J.R. pp. 1143; 1405A) This low priority for industrial users impacted with particular severity in areas like North Carolina where industrial users could not turn to alternative fuels, as many could in states to the North. (J.R. p. 1429)

The second regulatory change was to permit certain categories of emergency sales outside the price regulated system then in force. These sales were designed to attract into the interstate system sources of gas that were being held for intrastate use to avoid the federal regulatory system. Under that system, any sale from a natural gas field in interstate commerce permanently dedicated that field to the price regulated interstate system for its life. (J.R. pp. 1406-1409)

The emergency regulations permitted sales of several types that, although subject to regulatory approval as to price and other matters, were exempt from the regulated price itself, and did not dedicate the source of the gas to the regulated system. The two types of sales principally involved in this case were for periods of 60 days and 2 years respectively. The two year sales, known for the regulatory provision authorizing them as 533s, permitted direct purchase by end users from an intrastate pipeline. They required prior approval by the regulatory authorities (initially the Federal Power Commission (FPC) and its successor, the Federal Energy Regulatory Commission (FERC)). Sixty-day sales, ("2.68 sales") in contrast were made not to end users but to local gas distribution companies and did not require prior regulatory approval. After-the-fact reporting was required. The regulations also permitted "rolling over" 60-day contracts if more than one utility company was purchasing from the same intrastate source (J.R. pp. 1405-1405A; 1149-51; 1430-31)

The regulations specifically targeted the two year sales at industrial end users who were impacted by the priority allocations. The regulations thus sought to tap new sources of gas that were being held out of the interstate system by reason of the regulatory system and target that new gas to impacted industrial users. (J.R. pp. 1151-52; 1405A)

Both end users and local gas distribution companies were without experience in dealing directly with natural gas producers, having always obtained adequate supplies from the pipelines. (J.R. pp. 1154-55; 1537) Transco arranged some emergency sales, but did not provide adequate service of that kind for Consul's

clients. (J.R. 1428-29) The plaintiff's principals, Wilson and Deane, had extensive knowledge of the oil and gas industry, both from private business and government regulatory service. (J.R. pp. 1139-41; 1528-37) They, and other firms like them, served to find sources of gas for end users and local distribution companies. Consul worked on a retainer basis for its end user clients, with an added success fee if it actually obtained gas. Consul's fees were reported to the FERC and were the same as others charged for the same service. (J.R. pp. 1158-59) Consul had, by April 1978, signed at least 10 industrial end users, including ALCOA and Allied Chemical, (J.R. pp. 1542-3) seeking emergency gas in a total amount of 15,000 dekatherms a day, (J.R. pp. 1174-75) which at the contract price approved by FERC (J.R. p. 968) would have amounted to approximately $19.7 million dollars over the two year period, on which plaintiff would have earned fees of approximately $1.9 million. (J.R. p. 1601)

Plaintiff located a large new natural gas field in Greens Creek, Mississippi that had been discovered in 1977 and which was not yet producing. (J.R. pp. 1175-77; 1556) It was the only field large enough to meet the needs of all the plaintiff's clients. (J.R. 1175-77) It was not producing because its owners were not willing to sell in the regulated market and Transco had refused to make a two year emergency sale as the owners had requested. (J.R. pp. 1296-97; 1362-63) Transco instead applied for a different form of two year sale, for which it could not meet the regulatory requirements and was turned down by the FERC shortly before the plaintiff came into the picture. (J.R. pp. 1296-97; 1502-6) A connection from

the field to Transco's pipeline already existed, having been used for one 60 day sale and then discontinued. (J.R. p. 1514)

Plaintiff proposed a two year emergency sale, with interim 60 day sales that could be started immediately pending regulatory approval of the two year sales (J.R. pp. 1560-61); but the owners were skeptical because of their prior frustration with Transco. (J.R. pp. 1180-81; 1557-63) As a demonstration, plaintiff arranged by phone a 60 day sale from another intrastate source, Holiday Creek, to a local gas distribution company, Public Service of North Carolina. (J.R. 1181-82; 1563) The owners then signed contracts with plaintiff covering the entire 15,000 dekatherms a day needed by Consul's clients for two year 533 sales preceded by a series of 60 day sales. (J.R. pp. 1189-90; 1580-83) Transco, however, refused to transport the gas, notified local gas distribution companies that it would not transport gas under contracts arranged by plaintiff, and cut-off the already flowing 60 day sale from Holiday Creek to Public Service of North Carolina. (J.R. pp. 1194; 1581-82; 1288-89; 2325-29; 2497-98)

Following these refusals, Transco acquiesed in pressure from the owners of Greens Creek and filed an application for approval of the two year contracts with FERC which only it could do. Transco also agreed to transport the first of the 60 day sales under Consul's contract, but usurped all succeeding 60 day sales for itself. (J.R. pp. 1206-1214; 1587-89) There were delays in the regulatory approval process, however, which Consul charges to regulatory obstruction by Transco, that ultimately led to loss of the two year contracts. (J.R. 948-951; 963-965)

This action was brought in the U.S. District Court for the Middle District of North Carolina. Plaintiff charged Transco with violation of Section 2 of the Sherman Act on five counts, three under attempted monopolization and two of actual monopolization, as follows:

(1) Attempted monoply was charged on the basis that

(a) Transco's pipeline is an essential facility for transporting gas to North Carolina, that plaintiff was a competitor of Transco in arranging emergency sales under the federal regulations, and there was ample capacity in Transco's pipeline to make the transportation requested.

(b) An express reason for Transco's refusing to transport was a standing, written corporate policy to decline to transport by contract from a source of natural gas that Transco either at present or sometime in the future might wish to buy for itself, thus leveraging its monopoly power in the market for transportation to exclude competition in the distinct product market for natural gas.

(c) Another express reason for Transco's refusal to transport was to prevent local gas distribution companies from going out on their own to buy gas, and to prevent plaintiff from dealing with Transco's customers, the local gas distribution companies.

(2) Actual monopolization was charged with respect to the two fields from which transportation was refused, because both were included within the scope of Transco's policy described in 1(b) above, which extended to all commercial sources of natural gas in proximity to its pipeline, and because that foreclosure of competition was effective with respect to these two fields.

Prior to trial, the District Court awarded a partial summary judgment in favor of Transco with respect to the two year contracts on grounds of causation. (J.R. p. 1054) Consul appealed the summary judgment on both procedural and substantive grounds, but the Court of Appeals did not reach that issue because its ruling decided the liability issue in favor of Transco.

The case, limited to the 60 day contracts, was tried to a jury. Plaintiff introduced expert and party testimony as to the existence of all the various markets described above: the North Carolina end users that were totally dependent on Transco, the separate markets for transportation of natural gas and for natural gas as a product, the local gas distribution companies as distinct local markets; and the two fields of natural gas, Greens Creek and Holiday Creek, as relevant markets for purposes of actual monopolization. (J.R. pp. 1391-95; 1418-27)

The District Court gave an unchallenged charge on the relevant market. (J.R. pp. 1831-34) He also gave the requested charge on denial of an essential facility but refused to submit a special interrogatory to the jury on that issue on the ground that it would be tantamount to a directed verdict against Transco. (J.R. pp. 1638, 1792) He declined to instruct on le-

veraging on the ground that Transco was already in the business before the plaintiff entered the scene, (J.R. p. 1794) and refused to charge on market foreclosure without explanation. (J.R. p. 1794) He did not, however, instruct the jury to ignore these charges, which were made to the jury during the course of the trial. (J.R. 1113-14)

The jury verdict was expressed through answers to special interrogatories, in which they found that the plaintiff had proved a relevant market or markets and awarded damages pertaining to the refusal to transport from both Greens Creek and Holiday Creek. (J.R. p. 1858) The trial court entered judgement n.o.v. in favor of Transco on two contracts (out of four), one relating to Greens Creek, without explanation, and one as to the Holiday Creek shipment, stating that it was not a relevant market but with no further explanation. (J.R. pp. 1069 D-E)

No hearing was held on the request for injunctive relief. Plaintiff moved for transfer of that portion of the case to the Western District of North Carolina on the ground that another suit for injunctive relief against Transco had just been filed there by a group representing a cross section of North Carolina users of natural gas. That motion was denied. (J.R. pp. 1069 E-F)

Cross appeals were taken on all rulings of the trial court. Plaintiff appealed the judgement n.o.v. as to two 60 day contracts at Greens Creek, one at Holiday Creek, the partial summary judgment and denial of the motion to transfer.

The Fourth Circuit panel overruled the jury's finding that the Greens Creek field was a relevant mar-

ket, and held that the trial court should have entered a judgement n.o.v. against plaintiff on all counts. The panel also rejected the claims of attempted monopoly on the basis of its relevant market ruling, which therefore also bars the claim for injunctive relief based on charges of attempt to monopolize.

REASONS FOR GRANTING THE WRIT

1. Transco has and continues to use the strategic dominance of its power over Transportation to Foreclose Potential New Entrants into Product and Distribution *Markets for Natural Gas*

The shortage period of the 1970s was a watershed in the history of the natural gas industry. (J.R. pp. 1409-1411; 2478-80) Prior to that time only the interstate pipelines bought and sold natural gas from producers in the fields; and no one else sold gas to local gas distribution companies. (J.R. pp. 1391-1395) The shortages, and the emergency federal regulations were but the first of a succession of events that were to change this market structure permanently. (J.R. pp. 1409-1411; 2478-80)

Transco's Chief Executive Officer, W.J. Jack Bowen was deposed during discovery. In that deposition he described vast changes that had occurred and more that he expected to occur in this industry in the future. (J.R. pp. 2478-80). He also indicated a belief that under these changing conditions Transco's role would be changing and that it would be doing more transportation on a contract basis. (J.R. pp. 2499-2503). He was, however, unwilling to give assurance that plaintiff could obtain transportation then or in the future, and that a factor weighing against it would

be any conflicting objective of its own that Transco might have. (J.R. p. 2501).

During the trial, Transco's corporate witness testified that even under a publicly announced program to shift Transco's emphasis from buyer and seller to transporter of gas, the availability of transportation was largely a matter of whether Transco faced competition at a particular location. (J.R. pp. 1370-72).

More recently, the FERC has undertaken in a rule making proceeding to encourage natural gas pipelines to act as transporters and issued Order 436 as a result; but FERC has no authority to require pipelines to transport by contract, so the program is only voluntary.[1]

The problem is in no small part the built-in incentive which Transco has to use the leverage inherent in its control over transportation to further other corporate objectives not related to its public utility function of transporting natural gas for a regulated profit.

Transco Energy Corp., the holding company which controls the various operating subsidiaries, in addition to its regulated pipeline business, is in such unregulated businesses as exploration, coal, and synthetic fuels. (J.R. pp. 2472-73). The plaintiff's expert witness, Tom Hughes, who has extensive experience in the natural gas industry, including several high level regulatory positions, explained at least one incentive Transco has for preferring buying and selling gas rather than to transport it for a fee. Transco's earnings are the same in either case, since Transco is not

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[1] 50 *Fed. Reg.* p. 42, 408 (Oct. 18, 1985), *Regulations Preamble 1982-85* para 30-665.

permitted to charge a markup on gas which it purchases and re-sells. (J.R. p. 1307) It is only entitled to earn a regulated profit for transporting the gas. When Transco purchases and re-sells the gas, however, the entire volume of these wash sales is reported as part of the corporation's revenue. It is the difference, as Mr. Hughes pointed out, between Transco being the $3.5 billion company that it is and being a mere one-half billion dollar company, a fact that is useful to Transco in its other businesses. (J.R. pp. 1412-14)

During the shortage period, which was the subject of tne facts tried below, Transco reacted reflexively to the new influx of competition into what had previously been a natural monopoly. It first refused outright to transport under contracts arranged by plaintiff (J.R. pp. 1196-97; 1288-90); it advised plaintiff's customers that it would not transport gas under contracts arranged by plaintiff (J.R. pp. 2325-29; 2497-98); it expressed a purpose to prevent its gas distribution company customers from going out on their own to find supplies of gas (J.R. pp. 1187; 1340-41); then when producer pressure caused Transco to agree to file the necessary regulatory applications for two year contracts, Transco still held out in its refusal to transport under all but one of Consul's 60 day contracts, (J.R. pp. 1206-1214; 1587-89) and engaged in what Plaintiff contends was regulatory obstruction that resulted in delays fatal to Plaintiff's two year contracts. (J.R. pp. 948-951; 963-965)

The Transco policy under attack in this suit is therefore to use the strategic dominance inherent in its pipeline in just the way that this Court condemned

a transmitter of electric power for doing in *Otter Tail Power Co. v. United States*, 410 U.S. 366, *reh. denied*, 411 U.S. 910 (1973):

> "The District Court determined that Otter Tail has a strategic dominance in the transmission of power in most of its service area and that it used that dominance to foreclose potential entrants into the retail area from obtaining electric power from outside sources of supply . . . Use of monopoly power 'to destroy threatened competition' is a violation of the 'attempt to monopolize' clause of §2 of the Sherman Act. *Lorain Journal v. United States*, 342 U.S. 143, 154, 96 L.Ed. 162, 72 S.Ct. 181; *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 375, 71 L.Ed. 684, 47 S.Ct. 400." 410 U.S. 366 at 377.

In addition to its strategic advantage, Transco's pipeline constituted an essential facility for all North Carolina users, for whom there was no alternative, at a time of shortage and curtailment when there was ample capacity in the pipeline to transport all of the gas involved in this case. *United States v. Terminal Railroad Association*, 224 U.S. 383 (1912) (Denial of access to a central rail facility); *Gamco, Inc. v. Providence Fruit and Produce Bldg., Inc.*. 194 F.2d 484 (CA1), *cert. denied* 344 U.S. 817 (1952) (Denial of access to a central marketing facility); *MCI Communications v. AT&T*, 708 F.2d 1081, 1132, 1141-42, 1153-56, 1198 (CA7 Cir.) *cert. denied*, 464 U.S. 891 (1983) (Denial of access to a telephone system).

Moreover, by denying access by Plaintiff *both* to the sources of supply in the Greens Creek and Holiday

Creek Fields, and to the gas distribution companies and individual end users that were Plaintiff's clients, Transco engaged in illegal market foreclosure in violation of Section 2. *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) (Denial of access to radio advertising); *Gamco, Inc. v. Providence Fruit and Produce Bldg., Inc., supra.*

All of the above authorities were decided as illegal attempts to monopolize, involving specific intent, an element not requried for actual monopolization. *United States v. Griffith*, 334 U.S. 100, 105-6 (1948); *Otter Tail Power Co. v. United States, supra*; *United States v. Aluminum Co. of America*, 148F.2d 416, 431-32 (CA2 1945).

The Court of Appeals erred in seeking to avoid the force of these precedents on the ground that it disagreed with the jury's finding that plaintiff had proved the existence of a relevant market or markets in connection with its separate charges of actual monopolization of the Greens Creek and Holiday Creek fields. The establishment, *vel non*, of those markets, had no relevance to the above charges of attempted monopoly, which have been variously labeled the denial of an essential facility, leveraging, and market foreclosure.

As to all of these charges there was abundant and undisputed proof of the various markets involved, all of which were distinct from the two natural gas producing fields. The facts that there was no alternative means of transporting gas to North Carolina, and that Plaintiff and Transco were competitors in arranging emergency contracts were undisputed. *MCI Commu-*

nications Corp. v. AT&T, 708 F.2d 1081 (CA7) *cert. denied*, 464 U.S. 891 (1983) at 1132-33. There being no alternative, the elements of a relevant market were necessarily proved. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961).

There was likewise no dispute that the markets for transportation of natural gas and the product market for natural gas in proximity to Transco's pipeline are distinct, and that Transco was leveraging its power over transportation to exclude competition in the product market for gas. (J.R. pp. 1419-28; 1301, 1303)

Transco's purpose to foreclose market access by Plaintiff both to the sources of gas in the field and to gas distribution companies, whose pipeline systems constituted distinct markets, and end users who consumed it at the other end was clear from Transco's own admissions. (J.R. pp. 1187; 1340-41)

The Court of Appeals mis-characterized plaintiff's argument with respect to the necessary market proof by identifying it with a disputed Ninth Circuit view that proof of a relevant market is not necessary when the charge is attempted monopoly, citing numerous cases in other circuits that reject the Ninth Circuit's position. (Appendix at V A. p. 9a) The Ninth Circuit view, first stated in *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474 (CA9), *cert. denied*, 377 U.S. 903 (1964) held categorically that proof of a relevant market was not needed when the charge was attempted monopoly. That holding was based squarely on footnote 23 of this Court's decision in *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395-396 (1956)*. That footnote, which is reproduced in the margin[2], can be

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[2] 23. The Government notes that the prohibitions of §2 of the

read as implying that attempted monopoly cases, which require a showing of specific intent, do not

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Sherman Act have often been extended to producers of single products and to businesses of limited scope. But the cases to which the Government refers us were not concerned with the problem that is now before the Court. In *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555, a conspiracy to monopolize trade in vegetable parchment was held to be a violation of §2. Parchment paper is obviously no larger a part of commerce than cellophane. Recovery, however, was based on proven allegations of combination and conspiracy to monopolize, and the scope of the market was not in issue. P. 560. Similarly, *Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Co.*, 293 U.S. 268, ruled that a combination or conspiracy for the purpose of monopolizing the farm-paper business in the north central part of the Nation would be illegal by reason of the second section of the Sherman Act. *Lorain Journal Co. v. United States*, 342 U.S. 143, a case not cited by the Government, was concerned with even a smaller geographical area (dissemination of news in a community and surrounding territory). But the Court held only that defendant had attempted to monopolize, not that he had in fact monopolized. Also, this Court found in *United States v. Columbia Steel Co.*, 334 U.S. 495, that the "relevant competitive market" for determining whether there had been an unreasonable restraint of trade (or an attempt to monopolize) was the market for "rolled steel" products in an 11-state area. Women's dresses of "original design," *Fashion Originators' Guild v. Federal Trade Comm'n.* 312 U.S. 457; "first run" motion pictures, *United States v. Paramount Pictures*, 334 U.S. 131; the news services of one news agency, *United States v. Associated Press*, 52 F. Supp. 362 (S.D.N.Y.) *aff'd.* 326 U.S. 1; and newspaper advertising as distinguished from other means of news dissemination, *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, have all been designated as parts of commerce. All four were concerned only with the question of whether

involve the same elements of market proof as required in *du Pont*. The Ninth Circuit has, in any event, modified its holding, ruling in at least one case that proof of a relevant market was required in connection with a particular charge of attempted monopoly. *M.A.P. Oil Co., Inc. v. Texaco, Inc.*, 691 F.2d 1303 (CA 9 1982)

Plaintiff, however, did not rely on this Ninth Circuit authority, but on the cases cited above and the Fifth Circuit case of *Woods Exploration and Prod. Co. v. Aluminum Co. of America*, 438 F.2d 1286 (CA5 1971), *cert. denied*, 404 U.S. 1047 (1972). That case reversed a trial court's entry of judgment n.o.v. which was premised on ruling as a matter of law that a single natural gas producing field could not be a relevant market. The Fifth Circuit is one of the circuits that has expressed disagreement with the Ninth Circuit's view, *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 276 (CA5 1978) *cert. denied*, 440 U.S. 939 (1979). Nevertheless, in the course of its opinion in *Woods*, the Fifth Circuit quoted with approval from a district court case in the 10th Circuit, *Denver Petroleum Corp. v. Shell Oil Co.*, 306 F. Supp. 289, 304

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there had been an attempt to monopolize. *United States v. Aluminum Co. of America*, 148 F.2d 416 (CA2d Cir.), did involve the question of monopolization. Judge Hand found that the relevant market for measuring Alcoa's power was the market for "virgin" aluminum; he refused to consider to close competition offered by "secondary" (und) aluminum. The reason for the narrow definition was that Alcoa's control over virgin aluminum permitted it to regulate the supply of used aluminum even though the latter should be actually sold by a competitor. Consequently, the case is not particularly helpful in the problem of market definition now before the Court.

(D. Colo. 1969), involving a relevant market issue in connection with an oil pipeline as follows:

> "Defendent would have us engage in market analysis, considering the full breadth of 'economic and competitive realities,' to determine that the market structure is, if not nationwide, at least as broad as the entire Four Corners region. And there is no doubt whatever that Shell does not possess a monopoly of purchasing in any of these larger areas considered as a whole. However, in our opinion, such analysis is unnecessary in this case and the 'relevant market' is in that sense irrelevant. We have here a practice illegal in itself, operation of the pipelines as private carriers, a purpose and the obvious natural effect of which was to exclude nonlocal competition from the crude supply which Shell badly needed. When one must 'look' for a monopoly, determining a relevant market in which to look and in which to evaluate competitive effects is obviously an essential first step. But when, with an illegal practice such as is present here in mind, one can look at an area and see the existence of monopoly power, not by inference from market share, but by determining actual ability to exclude competition and control prices, there appears no real need to go further." 306 F.Supp. at 304."

Woods v. Alcoa and *Denver Pipeline* are the only prior cases involving a relevant market issue in the context of a petroleum pipeline. Both of them declined to rule, as the Fourth Circuit did here, that deliberate exclu-

sionary behavior may be excused by manipulating the term "relevant" market. Although the Ninth Circuit's interpretation of footnote 23 of the *duPont* decision in *Lessig* may have been overly categorical, that footnote, and the various criteria applied in *Otter Tail*, *Griffith*, and *Lorain Journal* support the above quoted language from *Woods* and *Denver Pipeline* that the market proof in attempt cases does not involve the same kind of "relevance" required for proof of actual monopolization. The Fourth Circuit's ritualistic insistence on the term "relevant" in a case involving hard core monopolistic behavior and ample proof of actual markets betrays a fundamental confusion that this Court should correct.

2. The Court of Appeals Erred in Ruling as a Matter of Law That Two Natural Gas Fields from which Plaintiff Sought to Meet Emergency Needs of Gas Distribution Companies and End Users were not Relevant Markets Susceptible to Monopolization in Violation of Section 2 of the Sherman Act

The Court of Appeals' relevant market ruling erred on two counts. It (a) improperly overruled a jury finding on a question of fact, and (b) applied an improper test of how to define a relevant market that is both local and regional in scope.

The jury was asked by special interrogatory whether Transco monopolized a relevant market or markets. The jury responded "yes" (J.R. p. 1858), and identified damages related specifically to Greens Creek and Holiday Creek contracts. (J.R. p. 1858).

The Court of Appeals, in overruling the trial court for refusing to enter judgment n.o.v. on two items of damage, and sustaining his entry of judgment n.o.v. on two others, did not find any flaws in the instruc-

tions to the jury, which neither party faulted. The Court of Appeals simply came to a different conclusion on the facts than the jury did, which exceeds the proper scope of appellate review under the constraints of the Seventh Amendment. *A & G Stevedores v. Ellerman Lines*, 369 U.S. 355 (1969); *International Boxing Club v. United States*, 358 U.S. 242 (1959).

The Court of Appeals, in rejecting the jury's finding that Greens Creek was a relevant market, did so on the basis that the relevant market was a national market for natural gas—stated *sua sponte* and without support in the record by either party:

> "There is no reason to believe that circumstances rendered the two fields around which the instant events occurred economically significant portions of the national market for natural gas."(App. p. 14a).

There is no such thing as a national market for natural gas. The record clearly showed that the constraint of pipeline transportation serves to define multiple markets measured by the reach of various pipelines. (J.R. pp. 1421-22) And further:

> There is no indication that Consul's efforts to find sources of gas elsewhere in the country were foreclosed by Transco's power in the market." (App. p. 14a).

This statement is irreconcilable with the undisputed evidence described above that Consul could not get gas anywhere else in the country; and that the only way it could get gas was through Transco.

The Fourth Circuit's ruling is also in conflict with *Woods Exploration and Prod. Co. v. Aluminum Co.*

of America, 438 F.2d 1286 (CA5 1971), *cert. denied*, 404 U.S. 1047 (1972), which held that a single natural gas field can be a relevant market. The Fourth Circuit stands alone in rejecting the idea that a relevant market may also have submarkets:

> "The use of the term 'submarket' is to be avoided; it adds only confusion to an already imprecise and complex endeavor. For antitrust purposes a product group or geographic area either meets the listed criteria, in which case it is a relevant market; or it does not, in which case it is irrelevant for purposes of analysis. No fiddling with nomenclature will change the analysis or result." *Satellite Television v. Continental Cablevision*, 714 F.2d 351, 355 n.5 (CA4 1983), *cert. denied*, 465 U.S. 1027 (1984)

This statement is in direct conflict with rulings of this Court and other circuits that local markets may be relevant markets so as not to excuse restraints exercised in them because larger regional or national markets also exist. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) ("However, within this broad market, well defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes."); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (CA DC 1977), *cert. denied*, 436 U.S. 956 (1978) (RFK stadium held to be a relevant market despite nationwide character of the National Football League). This Court emphasized in both *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 173 (1948) and *International Boxing Club, supra*, that: "§2 condemns monopoly of 'any part' of trade or commerce" 358 U.S. at 252.

CONCLUSION

The Fourth Circuit's opinion effectively nullifies three lines of precedent of this Court concerning attempted monopoly violations based on specific intent and does so through the misapplication in that context of a relevant market issue not related to those violations. It raises two distinct areas of conflict between the circuits: what kind of market proof is required when the charge is attempted monopoly, and whether sub-markets are to be recognized in the context of petroleum pipelines. It also effectively nullifies the plaintiff's Seventh Amendment right to a verdict of a jury.

Respectfully submitted,

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March 26, 1987

APPENDIX

No. 85- 1729 (L)

CONSUL, LTD.,

Appellant,

versus

TRANSCO ENERGY COMPANY, formerly known as TRANSCO COMPANIES, INC., and TRANSCONTINENTAL GAS PIPE LINE CORPORATION,

Appellees.

No. 85-1971

CONSUL, LTD.,

Appellee,

versus

TRANSCO ENERGY COMPANY, formerly known as TRANSCO COMPANIES, INC., and TRANSCONTINENTAL GAS PIPE LINE CORPORATION,

Appellants.

No. 85-1988

CONSUL, LTD.,

Appellant,

versus

TRANSCO ENERGY COMPANY, formerly known as TRANSCO COMPANIES, INC., and TRANSCONTINENTAL GAS PIPE LINE CORPORATION,

Appellees.

Appeal from the United States District Court for the Middle District of North Carolina, at Winston-Salem and Greensboro. Richard C. Erwin, District Judge. (C/A 82-574)

Argued: July 14, 1986 Decided: November 14, 1986

Before WIDENER and ERVIN, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

Dudley H. Chapman (Ward, Lazarus, Grow & Cihlar; Reginald F. Combs; House, Blanco & Osborn, P.A. on brief) for Appellant/cross-Appellee; John L. Jeffers (David D. Sterling; Baker & Botts; Charles F. Vance, Jr.; W. Andrew Copenhaver; Womble, Carlyle, Sandridge & Rice on brief) for Appellee/cross Appellant.

ERVIN, Circuit Judge:

This case never crosses the threshold of antitrust analysis under § 2 of the Sherman Act.[1] There is a mismatch between the assumed natural monopoly power of the defendant, Transco, in the market for transporting gas along its pipeline and the relevant market for Sherman Act purposes that the plaintiff, Consul, has chosen to plead. Consul contended that the relevant product in question was natural gas at the wellhead and the relevant geographical area was comprised of two natural gas fields in Mississippi, plus unnamed sources of natural gas to which Consul might be wrongly denied access by Transco. Even assuming that such an area could be located with greater specificity, there can be no meaningful showing that Transco has monopoly power over this product in that area. As a result of this mismatch, Consul fails to manifest Transco's monopoly power in a relevant market and so loses its case at the threshold.

I. THE PARTIES

Plaintiff-appellant Consul, Ltd. (Consul) is a consulting firm, organized as a North Carolina corporation, that engages in, among other things, the brokering of natural gas. It has done business in the Middle East and Europe, as well as North Carolina, Virginia, Texas, Mississippi and New York. Consul's sole shareholder and "key-man" consultant, Kenneth B. Wilson, teamed principally with a for-

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[1] U.S.C. § 2 (1982).

mer Chairman of the North Carolina Utilities Commission, Tenney I. Deane, in efforts to arrange sources of natural gas for industrial users in the southeastern United States in the period before deregulation of gas.

Defendant-appellees Transco Energy Company, formerly Transco Companies, Inc., and Transcontinental Gas Pipe Line Corporation (collectively "Transco") are Delaware corporations with national offices in Houston, Texas. Transco operates a transcontinental natural gas pipeline that extends from Texas to New York. Transco transports natural gas through the pipeline for a fee. In that endeavor, it is regulated as a public utility by the Federal Energy Regulatory Commission (FERC, previously the Federal Power Commission). Transco also engages in brokering natural gas and, to that extent, it competed with Consul during the time leading up to this litigation.

II. FACTUAL BACKGROUND

This dispute arose during a period of natural gas shortage in the 1970s, The shortage was exacerbated by federal regulations implemented by FERC. The regulations required that whenever natural gas from a particular field was sold in interstate commerce, that gas was thereafter dedicated to interstate sale and subject to interstate price controls. In contrast, intrastate gas was not regulated. Thus intrastate gas generally commanded a higher price than interstate gas. Accordingly, producers of natural gas sometimes withheld gas from the interstate market rather than subject it to price regulation.

To alleviate this problem, FERC adopted, in the early 1970s, certain exceptions to interstate price regulation. Among them were Order 2.68[2] and Order 533.[3] Under

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[2] 18 C.F.R. § 2.68 (1986), *removed*, 51 Fed. Reg. 11716 (April 7, 1986) (removal effective April 1, 1986).

[3] 18 C.F.R. § 2.79 (1986).

Order 2.68, producers could contract for the interstate sale of gas for sixty days without price regulation. No prior FERC approval was required for 2.68 sales. Under Order 533, producers could arrange two-year interstate sales without price regulation. Prior FERC approval, however, was required for 533 sales.

The Greens Creek natural gas field in Mississippi covers about four square miles near Transco's pipeline. The gas is owned by four separate producers, none of whom is a party in this case. In 1977, Transco sought to broker gas from this field. Because the Greens Creek producers wished to avoid interstate price regulation, Transco applied for an exception from FERC: a two-year "limited term certificate," which was similar to the Order 533 exception.[4] FERC rejected the application.

Subsequently, Consul sought to broker the Greens Creek gas to its clients in the southeast. Transco was aware of these efforts. Consul proposed that the producers seek FERC approval for a two-year 533 sale, and while the 533 application was pending, immediately make a series of sixty-day 2.68 sales. All gas was to be transported through Transco's pipeline. The Greens Creek producers agreed to this scheme, pending a demonstration of Consul's ability to make the necessary arrangements.

To this end, Consul arranged a 2.68 sale from another field, the Holiday Creek field in Mississippi, to Public Service Company of North Carolina. Gas under that contract began to flow through Transco's pipeline on May 21, 1978, at the request of Public Service. Transco learned of Consul's involvement in the Holiday Creek sale later, after the gas had begun to flow. Transco was hostile to Consul's efforts because it wished to broker the Greens Creek gas to the exclusion of Consul. For disputed reasons, Transco

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[4] *See* 18 C.F.R. § 2.70(b)(3) (1986) (codifying FERC Opinion 699-B, 39 Fed. Reg. 33206 (Sept. 16, 1974)).

cut off the gas flowing under the Public Service/Holiday Creek contract on May 24, 1978. This gas supply was restored for the duration of the sixty-day 2.68 sale after negotiations between Consul and Transco. Nevertheless, Consul lost commissions.

Based on the Holiday Creek sale, Consul was able to arrange four additional 2.68 sales from the Greens Creek field to Commonwealth Natural Gas in Virginia, to occur on July 1, September 1, November 1 and December 1, 1978. The Greens Creek producers also agreed to engage in a subsequent 533 sale. Transco initially refused to transport the gas under the contracts because of Consul's involvement. After negotiations, however, Transco agreed to transport the 2.68 sale scheduled for July 1. Transco also agreed to apply for FERC approval of the 533 sale, applications for such sales generally being made by the pipeline company.

While the 533 application was pending, Congress was formulating the Natural Gas Policy Act (NGPA). The NGPA began deregulation of natural gas prices.[5] The price disparity between interstate and intrastate gas began to be eliminated. Accordingly, 2.68 and 533 sales were no longer especially advantageous. In November, 1978, the NGPA became law.[6] FERC approved the 533 application at around the same time, but at a natural gas price that was not attractive to the Greens Creek producers. The producers then declined to contract with Consul for natural gas sales and arranged instead a favorable, long-term contract with Transco.

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[5] For a summary of the regulatory system under the NGPA, see Pierce, *Reconsidering the Roles of Regulation and Competition in the Natural Gas Industry*, 97 Harv. L. Rev. 345, 348-51 (1983).

[6] *See* Pub. L. No. 95-621, 92 Stat. 3352 (codified at 15 U.S.C. §§ 3301-3432 (1982)).

III. LITIGATION BELOW

Consul brought this action following the failure of its 533 sale. Generally, Consul alleges that Transco conspired and used its monopoly power over the pipeline to preclude Consul from arranging purchases from the Greens Creek and Holiday Creek fields in violation of §§ 1 and 2 of the Sherman Act.[7] With regard to the monopoly claim, Consul alleges that it lost commissions on the 2.68 sales in connection with Transco's refusal to facilitate those sales. Consul claims the loss of further commissions from the 533 sale on the basis of Transco's delay in filing the 533 application and obstructionism on the part of Transco, which allegedly caused FERC to postpone action on the application until passage of the NGPA. That is, Consul asserts that if Transco had not delayed the 533 approval process, the 533 sale would have been consummated, resulting in commissions for Consul. Consul also sought injunctive relief. That equitable claim is the subject of a separate proceeding.

Before trial, Transco moved for partial summary judgment on, among other things, the 533 claim. Transco argued that Consul offered insufficient evidence that Transco caused any damage to Consul in connection with the 533 sale. The district court granted the partial summary judgment in favor of Transco on October 31, 1984.

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[7] Sherman Act § 1, 15 U.S.C. § 1 (1982), is directed toward concerted activity: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal," with certain provisions concerning resale price maintenance.

Sherman Act § 2, 15 U.S.C. § 2 (1982), reaches single-firm efforts at monopolization as well as conspiracies: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . ."

At trial, the district court directed a verdict against Consul on its claim under § 1 of the Sherman Act, since there was no evidence of a conspiracy. Consul does not appeal that ruling.

As to the § 2 claim, the jury found that Consul was damaged in the amounts of $24,000 for the interruption of gas from the Holiday Creek 2.68 sale and $216,300 for the loss of sales from Greens Creek. After entry of judgment for treble those damages pursuant to § 4 of the Clayton Act,[8] Transco properly moved for judgment notwithstanding the verdict ("n.o.v."). The district court granted this motion in two respects: first, that there was no evidence that Holiday Creek was a relevant market, hence the $24,000 award could not stand, and second, that $62,100 of the damages awarded by the jury for the fourth 2.68 sale from Greens Creek had no basis in the record, and hence could not stand. The district court also denied Consul's motion to transfer the injunctive aspect of the case to the United States District Court for the Western District of North Carolina, Charlotte Division. Final judgment, after the damages were trebled, was entered for $462,600, on August 26, 1985.

IV. DISPOSITION ON APPEAL

Consul now appeals the partial summary judgment entered against it on the 533 claim and the judgment n.o.v. on the Holiday Creek and the fourth Greens Creek 2.68 sales, as well as the denial of transfer. Transco cross-appeals the adverse jury awards on the first three Greens Creek 2.68 sales. Jurisdiction is proper under 28 U.S.C. § 1291 (1982). We conclude that the district judge correctly found that Consul failed to establish Holiday Creek as a relevant market for Sherman Act § 2 purposes, and so affirm that part of the judgment n.o.v. We further con-

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[8] 15 U.S.C. § 15 (1982).

clude that the same failure is equally fatal to the entire case. Consul's claim may sound in tort, but it is insufficient to invoke the protection of the antitrust laws. Thus, we affirm the partial summary judgment on the 533 claim and the judgment n.o.v. as to the fourth Greens Creek claim. We reverse the district court's refusal to grant judgment n.o.v. on the first three Greens Creek claims. The denial of the motion to transfer is affirmed as within the district court's discretion.

V. DISCUSSION

A. The Relevant Market Requirement

Proof of a relevant market is the threshold for a Sherman Act § 2 claim. The plaintiff must establish the geographic and product market that was monopolized. This proposition has been practically incontrovertible since *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 177 (1965). *See, e.g., American Hoist & Derrick Co. v. Sowa & Sons*, 725 F.2d 1350, 1366-67 (Fed. Cir.), *cert. denied*, ___ U.S. ___, 105 S.Ct. 95 (1984); *RCM Supply Co. v. Hunter Douglas, Inc.*, 686 F.2d 1074, 1076 (4th Cir. 1982); *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 711-12 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980); *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 276 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979); *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1030 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1348 (3d Cir. 1975); *E.J. Delaney Corp. v. Bonne Bell, Inc.*, 525 F.2d 296, 305 (10th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 550 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *Agrashell, Inc. v. Hammons Products Co.*, 479 F.2d 269, 286-87 (8th Cir.), *cert. denied*, 414 U.S. 1022 (1973).[9]

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[9] Cases to the contrary appear in the Ninth Circuit. *See, Blanton v.*

Consul, undaunted by the weight of this authority, claims to have found three theories on which § 2 liability can be rested without reference to a relevant market. In the alternative, Consul proffers the two natural gas fields, Holiday Creek and Greens Creek, as well as "all other sources of natural gas from which there is no presently economically feasible alternative means of transportation other than Defendants' pipeline"[10] as the geographical limits of a relevant market, and natural gas at the wellhead as the product in question. We are not convinced by either branch of the argument.

Consul strenuously urges that there is more than one type of § 2 claim; in fact, it argues, there are at least four types, of which three—"leveraging" cases, "essential facility" cases, and "market foreclosure" cases—are not concerned with market definition. We take no issue with the usefulness of Consul's typology or the aptness of these labels in describing forms of action under the Sherman Act. The fact remains that a relevant market must be proven under any of these theories. This is clear from a reading of the authorities cited by Consul. *See, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366, 369 (1973) ("The aggregate of towns in Otter Tail's service area is

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Mobil Oil Corp., 721 F.2d 1207, 1213 (9th Cir. 1983) (plaintiff not required to prove a relevant market to show attempted monopolization under §2 when defendant engaged in *per se* violations of §1), *cert. denied*, ___ U.S. ___, 105 S.Ct. 1874 (1985); *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 903 (1964) (decided prior to *Walker Process*). But as the *Blanton* court made clear, the Ninth Circuit waives the requirement of proving a relevant market only in cases involving attempted monopolization rather than actual monopolization and in which the plaintiff shows either predatory conduct or a *per se* violation of §1. *Blanton*, 721 F.2d at 1214. We follow the rule established in this and most of our sister circuits, that proof of a relevant market is always required.

[10] Complaint at para. 30(c).

the geographic market in which Otter Tail competes for the right to serve the towns at retail.").[11]

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[11] Consul cites numerous other cases in its attempt to allay the problem of market definition. None is persuasive. Consul finds the beginnings of "essential facility" theory is *United States v. Terminal Railroad Association*, 224 U.S. 383 (1912), which, as Consul notes, predates the recognition of market definition as the indispensable element in Sherman Act analysis in *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1955). Nevertheless, *Terminal Railroad* evinces considerable concern for the particular effects of that defendant's actions on a particular market for rail transportation: St. Louis. *See*, 224 U.S. at 392-407; *see generally* Troy, *Unclogging the Bottleneck: A New Essential Facility Doctrine*, 83 Colum. L. Rev. 441 (1983) (arguing that essential facility cases fit, at the threshold, within traditional § 2 analysis, including market definition). This is the type of concern not presented by Consul's evidence, which cannot and does not establish the degree to which Transco has market power over natural gas at the wellhead. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927), to which we are also referred, is wholly inapposite: in that case the question of monopolization had been settled in a prior and separate suit. *See id.* at 369.

As for "leverage" theory, Consul itself acknowledges the need to prove monopolization in one market before examining the "leveraging" of that monopoly power in the separate market. In the case of *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944), cited by Consul, the relevant geographical market was clearly established: seventy-odd small towns in the mid-east. Similarly, in *United States v. Griffith*, 334 U.S. 100 (1948), the monopolistic practices involved corporations in Oklahoma, Texas and New Mexico that owned the only movie theater in each of fifty-three towns.

Nor do the "market foreclosure" cases to which Consul refers us offer a way around the requirement of market definition. The Court in *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953), struggled with the proper extent of the market for newspapers. *See id.* at 610 ("Once granted that the volume of commerce affected was not 'insignificant or insubstantial,' the Times-Picayune's market position becomes critical to the case.") (citation omitted). Likewise in *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), the Court examined the particular details of commerce in communication in and out of Lorain, Ohio, concluding that the Journal had "a substantial monopoly in its area." *Id.* at 154.

As Justice Frankfurter first noted,[12] and as this court recently reasserted, the relevant geographic market is the area in which buyers or sellers of the relevant product effectively compete. *See Satellite Television v. Continental Cablevision*, 714 F.2d 351, 357 (4th Cir. 1983). The formulation approved by this court in *RCM Supply* is helpful: "the geographic market should consist of *an area in which the defendants operate and which the plaintiff can reasonably turn to for supplies.*" 686 F.2d at 1077 (emphasis in original). *See Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327-34 (1961). The penultimate question, towards which this preliminary inquiry into market definition is directed, is whether the defendant has market power: the ability to raise prices above levels that would exist in a perfectly competitive market.[13] The geographic demarcation should not be too tightly drawn, unless clear evidence exists that potential competitors outside the region are hindered from entering. A market drawn too tightly, either in geographic terms that exclude potential suppliers or in product terms that exclude potential substitutes, creates the illusion of market power where none may exist. *See Jayco Systems v. Savin Business Machines Corp.*, 777 F.2d 306, 319-20 (5th Cir. 1985), *cert. denied*, ___ U.S. ___,55 U.S.L.W. 32004 (October 7, 1986); *American Key Corp. v. Cole National Corp.*, 762 F.2d 1569, 1580-81 (11th Cir. 1985); *cf. American Football League v. National Football League*, 323 F.2d 124, 129-30 (4th Cir. 1963) (describing limits on market in terms of the defendant's activity, but viewing that activity broadly to include all locations where the defendant might choose to

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[12] *See Standard Oil Co. (California) v. United States*, 337 U.S. 293 U.S. 293, 299 n.5 (1949).

[13] *See, e.g.*, II P. Areeda & D. Turner, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* para. 517 (1978); R. Posner, *Economic Analysis of Law* 195-201 (2d ed. 1972).

do business). Such a misleading start in antitrust analysis, always a difficult area for judicial resolution, *cf. Standard Oil Co. (California) v. United States*, 337 U.S. 293, 322 (1948) (Jackson, J., dissenting) (noting the difficulty raised by economic problems presented for judicial action in Clayton Act cases), makes accurate determination of the ultimate question—whether the antitrust laws have been violated—impossible.

B. The Market Pleaded

In this case, Consul urges that the relevant product is natural gas at the wellhead. The relevant geographical area pleaded is a strange amalgam of two natural gas fields in Mississippi plus any other areas in which Transco controls access to natural gas by virtue of the pipeline, but does not own the gas and would not transport it if Consul was able to broker it.

There is no way to establish Transco's market power in the market for natural gas at the wellhead on the basis of the above geographical limitation and the evidence presented by the parties.[14] The evidence did indicate that the producers at Greens Creek had numerous opportunities to sell gas to a large number of buyers other than Transco; that Transco bought only a small percentage of the gas produced in the county in which both fields lie; that Transco purchased gas all along its line from Texas to New York; and that the producers at Greens Creek considered attachment to the intrastate pipeline network a viable op-

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[14] The Fifth Circuit has held that a natural gas field constituted a relevant geographic market under § 2 of the Sherman Act. *See Woods Exploration & Production Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 414 U.S. 1047 (1972). Both parties in that case were owner/extractors of the gas field; their competition was tied to that field. In contrast, Transco can operate anywhere along the pipeline, and Consul is in the business of finding natural gas wherever it exists. Nothing inherent in the market, as Consul presented that market to us, links their competition to any one or two particular fields.

tion. There is no indication that Consul's efforts to find sources of gas elsewhere in the country were foreclosed by Transco's power in the market. There is no reason to believe that circumstances rendered the two fields around which the instant events occurred economically significant portions of the national market for natural gas. *Cf. Brown Shoe Co. v. United States*, 370 U.S. 294, 336-37 (1962) (regarding Clayton Act § 7). There is no way to measure Transco's market power in an area as ethereal as "sources of natural gas not owned by Transco but in close proximity to their pipeline and which would not be available to Consul as a broker under Transco's policies." While the market may not be measurable in "metes and bounds," *see Times-Picayune Publishing*, 345 U.S. at 611, it should be demonstrable in other than purely hypothetical terms. In sum, there is no reason to believe that the geographic market pleaded covered Transco's activities in a way that would encompass the area of effective competition between the parties, as brokers of natural gas.[15]

We conclude that the district court was correct in granting judgment n.o.v. on the fourth Greens Creek 2.68 contract and in granting summary judgment on the 533

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[15] *Cf.* Pierce, *supra* note 5, at 381 (discussing Transco's power in the market for transportation of natural gas into North Carolina). This case in no way forecloses a showing that a natural monopolist has violated the Sherman Act in a way analogous to *Otter Tail*. The plaintiff here, by focusing on the localized production source in Mississippi, has not presented us with the facts about the relevant market necessary for such a showing.

contract.[16] We reverse the refusal to grant judgment n.o.v. on the other 2.68 contracts.

AFFIRMED IN PART AND REVERSED IN PART.

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[16] Consul raises several points on appeal in connection with the granting of summary judgment, which points are mooted by the failure to prove a relevant market. We therefore decline to discuss the adequacy of hearing afforded to Consul on its charge of regulatory obstruction, or the sufficiency of the evidence that Consul presented. All of the contested evidence, if admitted, would not establish an *antitrust* violation under Sherman Act § 2, absent a clearer showing of Transco's monopoly power in a relevant market.